

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal Action
)	No. 13-10200-GAO
)	
DZHOKHAR A. TSARNAEV, also)	
known as Jahar Tsarni,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

SEALED

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Monday, May 11, 2015
8:45 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
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Mechanical Steno - Computer-Aided Transcript

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P R O C E E D I N G S

THE COURT: So let's start with the Sister Helen Prejean issue. First of all, just to put it aside, I overrule the government's objection to the timing. So with respect to the substance, it seems to me that the government acknowledges that she could give a lay opinion on remorsefulness, and I think that's then appropriate. She may do that. But it will be a lay opinion.

MS. CONRAD: Of course.

THE COURT: And a consequence of that is that she cannot vouch for it by reference to her particular experience in talking with death row inmates. To the extent there's an appeal to experience, it seems to me it places at 702 rather than 701, and that would be inappropriate. So she may testify to her lay opinion based on her observations of him as it equates to perceptions in Rule 701 but not with reference to experience with other death row inmates.

MS. CONRAD: May I just be heard very briefly? First of all, to clarify, just so that isn't coming out of completely left field, may she testify that she just -- by way of her background and why she's meeting with him in the first place, that she has a prison ministry and she has worked with prisoners?

THE COURT: Well, it will come out, I expect on cross-examination. I anticipate she has a policy viewpoint.

1 MS. CONRAD: I don't plan to elicit that on direct.

2 THE COURT: I expect the government will. You will
3 tell me whether you will or not. More precisely, the question
4 is if you will if I enforce the limitation that she can't refer
5 to it on direct.

6 MR. WEINREB: The only thing that we intend to elicit
7 on cross is that she is a leading opponent of the death penalty
8 in the United States, not anything about her prison ministry or
9 her ministering to prisoners. In other words we do not intend
10 to elicit at this point, assuming -- I should say this: The
11 cross always depends on the direct. The direct is going to
12 depend on the Court's ruling. I'm not sure we've heard all of
13 it.

14 But assuming that the direct testimony is the portion
15 of the proffer that the government proposed would be part of a
16 proper lay opinion, not channeling of hearsay, not vouching for
17 her experience, then we would not be bringing out anything
18 about *Dead Man Walking* or about how that all got started,
19 simply the fact that she speaks, writes, lectures against the
20 death penalty.

21 THE COURT: Right. So I think it's best limited
22 because otherwise it gets close to experience and, therefore,
23 expertise. She is entitled to put in some background, and I
24 think perhaps without getting -- I don't know if this goes over
25 the line or not, but she can say she has been in her order for

1 a long time and that includes spiritual counseling of people on
2 a one-on-one basis.

3 MS. CONRAD: Including prisoners?

4 THE COURT: I would allow including prisoners, but no
5 more than that.

6 MS. CONRAD: May I just on this point of experience,
7 just point out that, for example, you know, experts rely on
8 things that are outside their personal experience. Lay
9 witnesses rely in giving lay opinion on their personal
10 experience. For example, Kevin Roche testified that his
11 interpretation of Mr. Tsarnaev's actions in the cell block were
12 informed by his experience in a full-blooded Irish household of
13 what that gesture means. So, you know, which it seems to me
14 that experience comes into play in lay opinion.

15 THE COURT: Well, it may -- yes, in some general sense
16 it does. I don't think he gave the opinion that -- he got cut
17 off, in fact. I was interested in where he was going with it
18 as a personal matter.

19 MS. CONRAD: I don't think he got cut off. He said it
20 was a defiant gesture based on his experience.

21 THE COURT: Anyway, what distinguishes a lay opinion
22 giver from an expert opinion giver is that the lay opinion
23 giver is just the same as the jury and so, therefore, just as
24 the jury could tell whether someone is exhibiting anger or not,
25 the lay witness to events can do the same. But to the extent

1 the witness is different from the jury because of experience,
2 then it crosses over into 702 as a general proposition, so...

3 MS. CONRAD: Presumably, if the government asks about
4 her views on the death penalty, we can then inquire on direct
5 as to why -- how she formed those opinions?

6 THE COURT: We'll cross, and then redirect depends on
7 what happens in the preceding --

8 MR. WEINREB: So we have a request there, your Honor,
9 which we believe the government should be entitled to ask
10 questions to elicit her anti-death penalty -- the fact that she
11 is an opponent of the death penalty without opening the door to
12 her explaining the reasons why she is against the death
13 penalty. The reasons why she is against the death penalty are
14 wholly irrelevant. They have nothing to do with making her
15 more or less biased and they're improper for the jury to
16 consider. The government can do -- there's a very simple way
17 in which the government can do that, is by simply asking
18 yes-or-no questions, and we would ask that either the judge
19 instruct the witness or the judge have counsel instruct the
20 witness that if she's asked a yes-or-no question, she should
21 give a yes-or-no answer.

22 THE COURT: Well, you can do it too by prefacing it,
23 "I'd like you to answer this question yes or no, please."

24 MS. CONRAD: It seems to me that opens the door.
25 That's a choice the government makes if they choose to ask

1 about it.

2 THE COURT: No, I think a limited inquiry may be okay
3 to the extent that it may test a layperson's conceptual bias,
4 but it would have to be limited to avoid opening the door --

5 MS. CONRAD: Doesn't that then --

6 THE COURT: For example --

7 MS. CONRAD: -- open the door to her experience even
8 if it's not her moral reasons for her opposition?

9 THE COURT: No, I don't think so.

10 MS. CONRAD: Her experiential reasons for an
11 opposition?

12 THE COURT: No, I don't think so.

13 MS. CONRAD: Well, then, am I allowed to elicit on
14 direct that she is an opponent of the death penalty in order to
15 avoid --

16 THE COURT: Lancing the boil?

17 MS. CONRAD: Exactly.

18 THE COURT: I don't see why not.

19 MR. WEINREB: As long as --

20 THE COURT: It's limited to that.

21 Yeah. So just as a perception of a police officer as
22 to whether someone was intoxicated or not may be informed by
23 his point of view, I think point of view can influence a lay
24 opinion. That's all I'm saying.

25 MS. CONRAD: Of course. It's also informed by his

1 experience.

2 THE COURT: I think usually they're admitted as lay
3 opinions to the extent those kinds of things -- my point is
4 that your predisposition -- a layperson's predisposition to a
5 particular opinion might be something that a fact-finder would
6 evaluate in deciding on and considering an opinion.

7 MR. WEINREB: Your Honor, if defense counsel does
8 intend to lance the boil, so to speak, on direct, all we'd ask
9 is they do it through leading questions so that we don't risk
10 getting into impermissible areas.

11 THE COURT: Okay. Now --

12 MR. WEINREB: I had one request which is with respect
13 to the basis for her lay opinion that the defendant is
14 remorseful, it's one thing to say: I've had conversations with
15 him, I have observed him, and based on those conversations and
16 observations I believe he's sincerely remorseful, it's another
17 thing to say: We have discussed matters such as his regret or
18 such, as how he experiences the pain and suffering of the
19 victims, and channel his statements to get them in front of the
20 jury, essentially allowing him to testify through her, we would
21 ask that that be precluded, or in the alternative, that we then
22 have an opportunity to cross-examine him about his statements
23 to -- because she's obviously accepting them for the truth and
24 then repeating them to the jury.

25 MS. CONRAD: That's just -- I mean, I know there's one

1 case in which the government requested to cross-examine the
2 defendant about out-of-court statements, actually, about an
3 unsworn allocation, which as I've noted -- and I won't belabor
4 the point. In these cases it's not. It's an out-of-court
5 statement. It goes to state of mind, it affects her opinion
6 how he said it and what he said.

7 And the government wants, essentially, her to offer a
8 sanitized opinion so that then it has less credibility with the
9 jury. And the whole point of this is for her to be able to
10 explain how and why she concluded that he was sincerely
11 remorseful. The government wants this to be sanitized to the
12 point where they can simply say, "She's a death penalty
13 opponent. Of course she's going to say he's sincerely
14 remorseful. And what did he tell you that can help you decide
15 for yourself whether he's sincerely remorseful?"

16 They have to be able to evaluate the testimony based
17 on what she relays to the jury.

18 THE COURT: If she were to say, for example, "I have
19 formed my opinion because I believed him when he said"
20 whatever --

21 MS. CONRAD: Right.

22 THE COURT: -- that puts the believability of the
23 statement in issue for the jury to evaluate. If they found
24 that it was an unbelievable statement, then they would devalue
25 her opinion. So it seems to me to raise legitimately

1 believability. There are a couple of ways of proceeding from
2 that point: One would be to sanction the cross-examination,
3 another would be to give a cautionary reliability instruction
4 as we did for 302s about the jury not having seen the statement
5 themselves or so on and so forth. But I think that's hazardous
6 for the defense as well.

7 MS. CONRAD: Well, the statement -- the only statement
8 that she would testify to is that he said "No one deserves such
9 suffering." It's not a statement of fact; it's what he said.
10 It's --

11 THE COURT: Whether she believed it or not?

12 MS. CONRAD: It's not whether she believed -- she of
13 course believed that no one deserves such suffering. We all
14 agree no one deserves such suffering. It's not a factual
15 statement; it's a statement of his state of mind.

16 MR. WEINREB: Your Honor, the point is that if you put
17 the statements in front of the jury, then they don't need an
18 expert to tell them whether it's sincere or remorseful or not.
19 That the jury can determine. You don't need a lay opinion of
20 something that the jurors are in such a good position to decide
21 for themselves. If you have a lay opinion and the jurors are
22 hearing something that they didn't experience for themselves,
23 they didn't get to hear, they don't know what it is. That's
24 the first argument.

25 The second argument is that this is not like the

1 ordinary case. The defendant's own words about his state of
2 mind could not possibly be of greater interest to the jury.
3 And to give them a one-sided filtered presentation of solely
4 what the defense wants them to hear coming through the mouth of
5 a nun is entirely -- is so prejudicial and the -- that the
6 likelihood that the jury will not take it for the truth of the
7 matter asserted and will take it only to evaluate the opinion
8 of this person is zero.

9 They don't care what Sister Prejean thinks if they're
10 hearing what the defendant has to say; they care about what the
11 defendant said. They can judge for themselves. They've been
12 sitting through this trial since January, when she's just
13 stepping on this witness stand today.

14 THE COURT: Is that the only statement?

15 MS. CONRAD: Yes. And can I just say --

16 THE COURT: No. You can have it.

17 MS. CONRAD: Thank you.

18 THE COURT: And the reason is that it's a verbal -- if
19 it only goes that far, it's like a verbal act, in a sense, and
20 it can form the basis for the opinion.

21 MR. WEINREB: That's the only statement?

22 THE COURT: That's what I've been told.

23 MR. WEINREB: And we're not going to hear --

24 THE COURT: And the statement was?

25 MS. CONRAD: "No one deserves such suffering."

1 THE COURT: So the witness will say, "I base my
2 opinion in part on the fact he said to me, 'No one deserves
3 such suffering'?"

4 MS. CONRAD: Then his demeanor when he said it and so
5 forth.

6 THE COURT: If those are just the observations, then
7 she may --

8 MR. MELLIN: Your Honor, can we ask how often he said
9 this and when he said this, because the proffer --

10 MS. CONRAD: You can cross.

11 MR. MELLIN: Well, we were supposed to get a detailed
12 proffer.

13 MS. CONRAD: I think it was a pretty detailed proffer.

14 MR. MELLIN: It was two sentences.

15 THE COURT: If it's limited to that and no other
16 statements of facts by him about things, then I think that's --

17 MS. CONRAD: Correct.

18 THE COURT: -- okay. All right?

19 MS. CONRAD: Thank you.

20 THE COURT: Any other issues with her?

21 MR. WEINREB: Yes. So there were other things she was
22 proposing to say which seems completely unacceptable. She
23 planned to give an opinion -- first of all, she planned to say
24 that the defense asked her to see him to help him continue to
25 process the pain and grief he has caused indicating that the

1 defense believed that he was already in the process
2 of -- already processing pain.

3 THE COURT: Yeah. I see the quote. It's on page 5.
4 I would agree that that should not be -- that that's an
5 argumentative --

6 MS. CONRAD: I'm sorry. Page 5 of --

7 THE COURT: Paragraph 2.

8 MS. CONRAD: I'm sorry. From the government's? Not
9 mine? I'm looking at mine.

10 THE COURT: Yes, the government's.

11 MS. CONRAD: I'm sorry. Can I just clarify? I mean,
12 she didn't just parachute in. She was asked by the defense to
13 see him.

14 THE COURT: To meet with him, not to continue his
15 remorseful process. That's argumentative.

16 MR. WEINREB: And then this Paragraph 6 or, no --
17 Paragraphs 9 and 10 which I believe are the second-to-last and
18 last paragraphs.

19 THE COURT: The proffer? Okay.

20 MR. WEINREB: Of the proffer.

21 MS. CONRAD: I'm sorry. I'm still -- now I'm on the
22 government's. I just want to make sure I'm in the right place.
23 So all right. I just want to catch up. Go ahead.

24 MR. WEINREB: In fact, it might make sense to just go
25 through the proffer paragraph by paragraph because I think

1 that's the simplest way.

2 So we objected to Paragraph 3, which the Court already
3 ruled is inadmissible as part of the first experience
4 paragraph.

5 THE COURT: Right.

6 MR. WEINREB: Four, more experience; and 5, which is
7 more experience. Then the next one is the one that has the
8 "continue to process the pain and grief."

9 THE COURT: Right. In the hope. That would go out,
10 right.

11 MR. WEINREB: Then --

12 MS. CONRAD: Well, but the next you agreed to. To see
13 if he would be open to working with her would be okay?

14 MR. WEINREB: Yes, we don't object to that.

15 THE COURT: Okay. So the rest of that paragraph.
16 Yeah.

17 MR. WEINREB: Then the next paragraph, we have gotten
18 the stipulation that that will be reduced to one sentence the
19 Court has approved.

20 MS. CONRAD: I'm sorry. Which paragraph are we on
21 now?

22 MR. WEINREB: The top of page 3.

23 THE COURT: What the discussion was? About what the
24 discussion was?

25 MS. CONRAD: So what's the proffer with that?

1 THE COURT: In other words, to the extent the
2 discussion -- as I'm understanding it, to the extent discussion
3 calls -- could call for evidence of what he said specifically.

4 MS. CONRAD: But these are just topics.

5 THE COURT: Right.

6 MS. CONRAD: The topics are okay?

7 MR. WEINREB: Well, I think if they -- if the topics
8 are at this level of generality.

9 MS. CONRAD: They are.

10 MR. WEINREB: They spoke about spirituality, religion,
11 and then, you know, but without regret indicates that he was
12 pressed for regret. I think anything that gets -- that is a
13 feeling imputed to him.

14 MS. CONRAD: Well, but we discussed just to say they
15 discussed religion and spirituality makes it sound like this
16 was a theology class. They discussed what he did.

17 MR. WEINREB: That's fine. They discussed religion,
18 spirituality and the circumstances of the crimes.

19 MS. CONRAD: Well, not the circumstances of the crime.
20 It's, you know, his feelings about the crime.

21 THE COURT: Without giving content.

22 MS. CONRAD: Right. His feelings about the crime.

23 THE COURT: Without giving content to his feelings
24 about the crime.

25 MR. MELLIN: That's the problem, your Honor. Sister

1 Prejean may --

2 MS. CONRAD: I'll speak to her.

3 THE COURT: I assume she'll be talked to.

4 MS. CONRAD: And I'm sure the government will be --

5 THE COURT: And the only other specific thing here
6 is -- no, I guess it comes to the next --

7 MR. WEINREB: Right. Then the next paragraph is fine.
8 Then in these two paragraphs that she sees in him an awareness
9 of the pain and anguish that he has caused, we would argue that
10 is not a helpful opinion based on rational observation but is
11 simply speculative and argumentative.

12 MS. CONRAD: May I respond? I mean, that's part of
13 why she thinks it's sincere. To basically say "He said these
14 words, I believe he's sincerely remorseful," and not be able to
15 say, you know, what it is she sees in him that makes her
16 believe he's sincerely remorseful.

17 THE COURT: To the extent -- and this is hard to place
18 on one side of the line or not. To the extent it is
19 perceptions, yes; to the extent it is evaluation, no, so...

20 MS. CONRAD: Well, evaluation is lay opinion.

21 THE COURT: So processing herself and her -- maybe
22 goes too far into expressing her own opinion about things, you
23 know. As an overlay her opinion is about his remorse, which
24 she can say, and she can say -- I mean, again, she can -- for
25 example, she could say he looked pained or something like that.

1 That's a physical observation.

2 MS. CONRAD: Also an awareness of the pain and
3 anguish.

4 THE COURT: I guess to the extent her observation may
5 include a moral component --

6 MS. CONRAD: Right.

7 THE COURT: -- that would go too far.

8 MS. CONRAD: Correct. And certainly she wouldn't be
9 saying "I believe he's sincere because I believe all people,
10 you know, come to realize" -- you know, it's not a generality;
11 it's what she saw in him.

12 THE COURT: Physically saw in him.

13 MS. CONRAD: Well, saw on him. And also based on
14 their relationship, which is a big part of it, that they met a
15 number of times, they established a rapport, they established a
16 level of honesty. That all goes into how you evaluate what
17 someone says to you and you know --

18 THE COURT: Fine. To some extent, yes. I guess a lot
19 of this is going to depend on how it actually comes out, but I
20 think she could probably say "In my opinion we developed a
21 level of trust" or something like that.

22 MR. WEINREB: See, your Honor --

23 MS. CONRAD: It's not a moral judgment; it's --

24 MR. WEINREB: -- one of the problems here is who they
25 picked to be this witness. "See" is a very freighted term when

1 it comes out of the mouth of a religious figure. Catholics, as
2 well as those in adherence of other religions, are told that
3 God sees in us, God's representatives on earth can see in us.
4 When she says she sees in him, that can be taken as you may not
5 see it, but I see it. I can see something in him that the
6 ordinary person cannot see.

7 So to say that he looked pained is -- I think conveys
8 something quite different from I see something in him that you
9 should believe is there. "I'm a nun. I know."

10 MS. CONRAD: This is not a script. This is not
11 verbatim. These are -- you know, I think we provided what the
12 Court asked for and, you know, if we're going to start
13 nitpicking every word because it might be spun this way or that
14 way, you know, I think we're never going to get through this
15 direct, for one thing.

16 THE COURT: Yeah, I don't -- I think that's
17 fine-tuning it a little too much. But I do want to emphasize
18 the next sentence, we talked about the second part of it. But
19 that he regrets his actions you think is an affirmative
20 statement. That's a cross-examination problem.

21 MS. CONRAD: And I think actually the words she's most
22 likely to use is "no one deserves to suffer like that." I
23 think that's his quotes -- comes as close to a direct quote as
24 it's going to be, which is probably less offensive to the
25 government, that no one deserves the suffering that he realizes

1 he caused.

2 MR. WEINREB: We don't object to her saying she
3 believes that he's sincerely remorseful, but we object to that
4 that he will painfully remember his actions and the harm he
5 caused for the rest of his life. That is just speculative.

6 THE COURT: I think that goes too far.

7 MR. WEINREB: And then in the final paragraph, we also
8 believe -- object to she "sees in him a very good man with a
9 potential to grow and mature and to continue to grasp and face
10 up to the harm he caused." That is not a lay opinion.

11 THE COURT: I agree. The potential is not a lay
12 opinion.

13 MS. CONRAD: What about the next sentence?

14 MR. WEINREB: And then if she is allowed to she will
15 visit him in the years to come and will accompany him along his
16 way. That has nothing to do with a lay opinion. It is also
17 entirely speculative and misleading. The reality is this is a
18 76-year-old woman. What does it even mean to say she'll visit
19 him. What, once? 100 times? What does it mean to accompany
20 him on his way? Is he going somewhere? She's implying there's
21 a spiritual journey, he'll get somewhere. "I'll accompany him
22 as far as I can." All of that is complete -- it's
23 argumentative. It's not a lay opinion.

24 MS. CONRAD: Your Honor --

25 MR. WEINREB: It's not something the jurors themselves

1 could come up with.

2 MS. CONRAD: If I may, the government having alleged
3 as an aggravator that the defendant demonstrated, past tense,
4 lack of remorse, and then in its opening squarely put their
5 feet down on was and is unrepentant, untouched, uncaring, and
6 unchanged at one point, the government essentially opened the
7 door to saying not only that he is unchanged but that he is
8 incapable of change. The government did not have to argue it
9 that way but they chose to do so.

10 THE COURT: That goes beyond a lay opinion.

11 MS. CONRAD: Well, how about "would be willing to work
12 with him in the future"?

13 THE COURT: I think it's irrelevant. So I would agree
14 with the government. So I think the last paragraph does not
15 have --

16 MR. WEINREB: Your Honor, without belaboring things, I
17 would like to clarify the record in one respect. The
18 government does not -- although I know the Court has ruled that
19 the late notice issue is gone, so we're not arguing it, but I
20 want the record to be clear that the government does not
21 concede that it opened the door to anything. When
22 Ms. Pellegrini said in her opening statement "is unrepentant,
23 unchanged" and so on, she was pointing at the picture of him in
24 the lockup, and that was what she was suggesting.

25 The aggravating factor in this case is the defendant

1 demonstrated a lack of remorse, and we have only argued to the
2 jury and will only argue to the jury that he demonstrated a
3 lack of remorse in the days after the marathon bombings and the
4 murder of Sean Collier and when he was in the lockup. We don't
5 dispute that the defense can put on character evidence of the
6 defendant's remorsefulness independent of the government having
7 opened the door to it. The government doesn't have to open the
8 door to it. His character is at issue. But we don't believe
9 that this whole open-the-door argument is productive and I
10 don't want the record to be left with the impression that we do
11 agree to it. The defense --

12 MS. CONRAD: I want to be clear that the transcripts
13 show that the statements that I quoted in my motion -- or my
14 reply, opposition, as the government put it, all came before
15 the jury saw that photograph. When Ms. Pellegrini says he was
16 and is indifferent, it was before that moment. The record
17 speaks for itself. That's what the transcript says.

18 THE COURT: I think we've had a little bit of this on
19 both sides in terms of the openings being a little exaggerated,
20 perhaps.

21 But anyway, so after the testimony of Sister Helen,
22 the defense will rest?

23 MS. CLARKE: That's correct.

24 THE COURT: Any cleanup matters we need of any kind?

25 MS. CLARKE: I think everything has been denied by

1 now.

2 (Laughter.)

3 THE COURT: That just -- this is not germane really to
4 the present business, but it's soon to be future business. As
5 we look at the verdict slip and so on, is there any dispute or,
6 contrary, is there a stipulation that the defendant was 18 at
7 the time of the events or will that be an element that the
8 jury -- we should instruct the jury on --

9 MR. MELLIN: Your Honor, I think we have to.

10 THE COURT: -- because I noticed in, I think it was
11 the form, verdict form, that the defense suggested it was not
12 in there. It is in some of the ones, other models we've looked
13 at.

14 You don't have to answer right now but tell us whether
15 you want the jury to answer that question or not or whether
16 they can be told --

17 MR. WEINREB: I think whether stipulated or not, I
18 think they have to find it.

19 MR. MELLIN: Agreed.

20 THE COURT: You want it in there no matter what?

21 MR. WEINREB: Stipulating means it's not in dispute
22 and they can accept it as true, but I think they have to find
23 it, and we would be concerned if they didn't.

24 MS. CLARKE: I think there was a question, and maybe
25 we can talk about this when we talk instructions, but I think

1 there was a question when the victim impact regarding Martin
2 Richard goes to the jury because victim impact was not put on
3 as to him.

4 THE COURT: Okay.

5 MR. BRUCK: We will have the final list of mitigating
6 factors to provide to the Court today. We're going to have one
7 more request in the charge with a memo we'll also get to you at
8 some point in the day.

9 THE COURT: Okay. So the defense will conclude. So
10 let's turn to the rebuttal witnesses. As a general matter I
11 don't think the government needs to refrain from rebuttal
12 evidence of its own even if a point has been made on
13 cross-examination of a defense witness. In other words, I
14 think the government is entitled to an authoritative witness of
15 its own on rebuttal. It can get redundant and cumulative in
16 the sense of wasting time because it's saying things that
17 they've already heard, but I do think in a sense the
18 government's entitled to get it from the mouth of a government
19 person. But that's not license to go on at great length.

20 And I think it should be particular to the structural
21 operation of the SAMs. I think it -- to get into other cases
22 specifically I think diverts attention from the issues here.
23 And you have issues of comparability and so on and so forth,
24 and I don't think other cases ought to be discussed. That
25 includes the nine down to three or whatever the numbers are.

1 MR. MELLIN: The government does not want the numbers
2 out --

3 THE COURT: Right.

4 MR. MELLIN: -- because I think Mr. Bezy --

5 THE COURT: I want to focus on the structure. The
6 SAMs permit relief, I guess is the government's point of view,
7 under certain circumstances, and it is available when the
8 circumstances are satisfactory to the people making the
9 decision, that even people convicted of terrorism crimes can
10 get relief. Whether this defendant will or whether others did
11 on whatever conditions, there's just no way of comparing the
12 prospect of --

13 MR. WEINREB: Mr. Bezy was allowed to testify --

14 MR. MELLIN: Your Honor, we should be able to rebut
15 that. I do think Mr. Bezy left a very misleading if not false
16 impression that there have been numerous SAMs violations, and
17 he said he was unaware of any. And the examinations will be
18 very truncated and very focused.

19 THE COURT: I think you could say in general terms
20 that relief has been given, but to then be specific as to the
21 criteria by which it was given -- because, I mean that's simply
22 saying the availability -- for example, I think it's legitimate
23 to say the availability of relief under the SAMs is not just
24 theoretical in the language of the SAMs, it has and actually
25 has occurred. But to go any further and to try to

1 compare -- to suggest that there's a ratio, and therefore a
2 probability, I think goes too far. So if you say of the
3 original whoever was in 2002, three --

4 MR. MELLIN: Seven down to three, right.

5 THE COURT: I think that suggests a probability which
6 is speculative and unreliable. So the numbers I think have to
7 stay out of it.

8 MR. WEINREB: What if we avoid any specific numbers
9 and say a number have so that --

10 THE COURT: It has happened, okay?

11 MR. MELLIN: Yes.

12 MR. BRUCK: Now, when we're talking about relief,
13 we're talking about the government withdrawing the SAMs. There
14 was an implication raised, The courts could do this, and no
15 court has ever ordered a SAMs withdrawn. There's been -- and
16 no court has ever granted -- has never issued an order even
17 altering or requiring the government to make the slightest
18 variation in a SAMs but, yes, there has been back and forth,
19 there's been negotiation, there have been compromises, but that
20 gets us into a world of comparison that would keep us here for
21 the rest of the week.

22 So the subject of court review should not be
23 mentioned. It's so unfair and it is so impossible to respond
24 to and it appeals to this popular idea that there are liberal
25 judges who just can't wait to let people loose and undermine

1 national security and so forth. We don't know what the
2 political views of jurors are going to be on these areas. If
3 there was any factual basis to it, that would be one thing, but
4 there isn't. It's nothing but an appeal to bias and suspicion.
5 So it's --

6 THE COURT: Well, let me ask you this: No court has
7 ever ordered it. Has there been litigation over it?

8 MR. BRUCK: Of course there has been.

9 THE COURT: Maybe that's a way of saying it.

10 MR. BRUCK: But that implies -- if there's been
11 litigation that has run into essentially a brick wall in terms
12 of getting a court to order relief, that opens the door and
13 doesn't allow us to close it. And they're calling witnesses
14 who will say, Oh, well, I mean, why should courts -- the fact
15 that -- prisoners can sue over anything, and do as you well
16 know, as every federal judge knows.

17 To inject that when this is an area to which courts
18 defer to the executive branch -- this Court deferred to the
19 executive branch when we asked the SAMs to be removed. It
20 just -- it is enough that the government -- that the SAMs are
21 imposed and they are sometimes allowed to lapse, or at least
22 they are sometimes withdrawn by the government. That tells the
23 jury everything they need to know: That they don't stay in
24 effect forever in every case. End of story. Beyond that,
25 there's simply no way to have a fair airing of this.

1 And the fact that the defendants are allowed to send,
2 you know, handwritten pleadings to the Court saying, "Please do
3 something" that no court has ever done and no court probably
4 ever will, does illuminate the facts for the jury as to what's
5 going to happen to this uniquely spotlighted defendant who's
6 likely to stay under the SAMs for years and years, and
7 presumably for decades, and will stay at ADX even if it
8 doesn't. Ramzi Yousef went there in 1998 and he's never
9 leaving, and our kid is in the same --

10 MR. MELLIN: Your Honor, that's not correct. Walker
11 Lindh went there in 2002 and he's no longer there. It's unfair
12 for them to try to leave this impression which they've left
13 which is incorrect. I don't need to get into the names or say
14 the names like Walker Lindh or anything like that, but it's
15 wrong to leave the impression someone who is convicted of a
16 terrorism charge, who is on SAMs, who is sent to ADX will
17 always be at ADX.

18 MR. BRUCK: Walker Lindh was serving a 20-year
19 sentence. There is no possible way to compare that case to
20 this case. And that's the problem. And that is why this is a
21 brier patch that, you know, we just should stay out of. It is
22 enough that the SAMs are not necessarily permanent. They can
23 be lifted. They have been lifted. End of story.

24 MR. WEINREB: Your Honor, if I may make a few points.
25 One is that the reality is that litigation is not always

1 resolved with a court order one way or another. People often
2 settle litigation, and that happens with respect to the SAMs
3 all the time. And it happens often with the courts signaling
4 to one party or the other that it will -- it is expecting
5 relief or seeking a negotiated modification of the SAMs in
6 order to avoid a court order. That is exactly what happened in
7 this case.

8 Secondly, to say that the government is trying to open
9 a can of worms here really rings hollow because it is the
10 defense and only the defense who brought this up, introduced
11 this entire topic. They basically -- Mr. Bruck said to the
12 jury in his opening statement and tried to establish through
13 Mr. Bezy two propositions that cannot, in fact, be proved
14 because they are not true. One is that the SAMs will always be
15 in place on this defendant and the second is that he will never
16 be stepped down. That is not only not true but it's not
17 likely.

18 And it's one thing to say that it's a difficult issue
19 for the jury to understand, it requires, you know -- that
20 reasonable limits have to be placed on the testimony -- that's
21 something the Court's equipped to do -- but it's another thing
22 to say that the defense has put on its one-sided story from
23 which they're completing the picture. That would be unfair and
24 it's something they opened the door to, not us.

25 MR. BRUCK: Well, I mean, I think the Court's initial

1 ruling seems to --

2 THE COURT: I think it is fair and probably -- not
3 probably, I guess it is accurate at a level of generality to
4 say that -- I think -- "there has sometimes been litigation
5 over the extent of the SAMs and it has sometimes resulted in
6 modification." That's a true statement?

7 MR. BRUCK: It has sometimes resulted in the
8 government deciding --

9 THE COURT: "It maybe resulted" is conclusory.

10 MR. BRUCK: And the government has sometimes --

11 MR. WEINREB: Your Honor, that's a matter for
12 cross-examination.

13 THE COURT: I mean, it is true that litigation that
14 doesn't proceed to judgment can have real effects changing the
15 prior relationship of the parties. I don't think there's any
16 question about that.

17 MR. WEINREB: That certainly happened in the case of
18 Richard Reid. There was excessive litigation over the SAMs in
19 that case, and ultimately the government would --

20 MS. CONRAD: You're talking about pretrial litigation?

21 THE COURT: Is it still at a very high level without
22 no --

23 MS. CONRAD: Was that -- I want to be clear. When you
24 say Richard Reid, our office didn't litigate the trial.

25 MR. WEINREB: Judge Young kept continuing supervision

1 over the SAMs even after the defendant was put in BOP. For
2 example, Judge Young ordered that the defendant could not be
3 interviewed unless it was videotaped and he had an opportunity
4 to review it and various other things. I'm not sure which of
5 these are under seal or not.

6 MS. CONRAD: I don't think any of that --

7 MR. WEINREB: So I don't want to put things on the
8 open record. But in any event, it is the reality that judges
9 do exercise a degree of supervision over SAMs, and either by
10 indicating what a ruling will be, if not making an actual
11 ruling, affects the modifications.

12 THE COURT: Would either of these witnesses have been
13 in a position to affect or execute the government's policy in
14 litigation; that is, to approve an amendment to the SAMs?
15 Participate in the process? In other words, could they testify
16 about that process?

17 MR. MELLIN: Yes, and as a matter of fact, that's what
18 Agent Nicolet would be talking about. She is the unit chief in
19 Washington, D.C., for the FBI who is in charge of overseeing
20 the request for terrorism SAMs. So she can discuss that.

21 THE COURT: In other words -- I guess I'll refine my
22 question -- would she have personal knowledge of a -- of the
23 fact, if it is a fact, that litigation brought has resulted
24 in --

25 MR. MELLIN: Modifications.

1 THE COURT: -- modifications by the government?

2 MR. MELLIN: Yes. Yes. She is a lawyer and she's
3 also an FBI agent.

4 THE COURT: Well, I think testimony at that level of
5 generality is okay without any specific cases.

6 MR. WEINREB: One other thing we'd like to revisit
7 here is our request that the government be able to put in some
8 limited testimony about what, in fact, the conditions of the
9 defendant's confinement within his cell would be. He was asked
10 about -- Mr. Bezy was able to testify that he has to back up to
11 a slot in the wall and have handcuffs undone and various other
12 things. Mr. Bruck again made a very big point in his opening
13 statement and tried his best to develop through Mr. Bezy's
14 testimony a picture of life in ADX. And we believe that it is
15 an entirely fair response to that to offer some limited
16 testimony about what it would be like, and in particular, that
17 there is some programming for defendants who are there, that
18 they have television and that they have access to education
19 like to be able to take online courses or whatever it is, video
20 courses and so on.

21 MR. MELLIN: True.

22 MR. WEINREB: And it seems as if that's a pretty minor
23 thing that the government is asking permission to do. It is
24 responsive to what was said both in the opening statement and
25 in Mr. Bezy's testimony, and I don't think that there's

1 something, you know, incredibly prejudicial about it to
2 outweigh its probative value because it's something that has
3 been raised as an issue in the case and something the jurors
4 are no doubt interested in.

5 MR. BRUCK: I mean, we went into the issue with
6 Mr. Bezy of restrictions on communication. He accurately
7 described that there are three levels and that there is more
8 communication at the third level if a defendant -- if the SAMs
9 are modified to allow a defendant to reach the third level in
10 the SAMs structure. He did not testify one way or the other
11 about conditions. We avoided that. We didn't put in the
12 pictures. We stayed away from the whole area. And now to say,
13 Well, that opens the door to cable television and ESPN and all
14 these inflammatory details, the government is pushing so hard
15 not because they think it's modest but because they think it's
16 huge. They've been pushing on this since day one. We did not
17 open the door to it, we did not create a miscommunication
18 whether he'll be allowed to.

19 Mr. Bezy's testimony was accurate on that. It wasn't
20 spun perhaps the way the government would like it but that
21 isn't -- that doesn't mean that they're entitled to go into new
22 areas, and that's what they want to do. This is -- you know,
23 this is just -- this is inflammatory and it should not be
24 allowed. The Court ruled at the beginning of this that we were
25 going to stick to the SAMs and that's the correct ruling.

1 MR. WEINREB: Your Honor, for the defense -- for
2 Mr. Bruck to say in his opening statement the Rockies are right
3 there but the defendant won't be able to see them because he'll
4 only have a tiny slit in his wall and that's all he could see
5 out of, for him to say in his opening statement the defendant
6 will spend the rest of his days doing nothing but thinking
7 about what he did to these victims, implying he'll have nothing
8 else to do in his cell other than that because all he'll have
9 is four walls to stare at, is what opened the door or invites
10 the -- creates the necessity for some limited evidence to
11 provide a more complete picture of what the defendant will be
12 able to see while he is sitting in his cell.

13 He will not be blocked from view of the outside world
14 because it will be piped into his cell through a screen. So
15 the fact that there's just a slit in the window that doesn't
16 even let him see the Rockies does not in any way convey what
17 the -- the visual, you know, distraction the defendant will
18 have from having to think about his crimes for the rest of his
19 life while he's sitting in that cell.

20 THE COURT: So what are the specifics that you would
21 want to put in?

22 MR. MELLIN: Just what is in the cell, your Honor.
23 The fact that there is a desk, so he can write on his desk, the
24 fact that there is a TV in there with cable television.

25 THE COURT: Who controls it?

1 MR. MELLIN: The defendant -- or the inmate controls
2 it. There are 50 channels of DirecTV that's piped into their
3 room along with music as well, so the inmate controls all of
4 that. They can watch whatever television stations they want.
5 They can watch educational training, they can watch videos that
6 are -- to workouts like yoga or something like that. The
7 individual inmate controls all of that.

8 Also, just in response to what Mr. Weinreb was saying,
9 Mr. Bezy testified and left the impression that the defendant
10 or an inmate will be left in his prison cell for 23 hours a day
11 with nothing to do, and this is -- these are the things they
12 can do: They can watch television the entire time.

13 THE COURT: What else. That's it? Just television?

14 MR. BRUCK: Nothing --

15 MR. MELLIN: They can watch television, education.

16 MR. BRUCK: The "nothing to do" is supplied by
17 Mr. Mellin. That isn't what Mr. Bezy said. I point out most
18 of what the government is complaining about they elicited on
19 cross. It was not about H unit; it was about ADX generally.
20 And it came out because Mr. Mellin elicited it. It did not go
21 beyond what the government is saying, and we opened it up and
22 didn't like the answer, and now we're entitled to open it up
23 even further. This is completely barred. It does not go to
24 the SAMs.

25 THE COURT: Let me think about this. We have a little

1 bit of time before the witness testifies so let me think about
2 it.

3 Let me complete the government's proffer for rebuttal.
4 Dr. Francis: Let me set the table by saying it sounded like he
5 was an expert rebuttal witness, and if the testimony is lay
6 opinion, it sounds like he would not be necessary.

7 MR. WEINREB: That's correct. If the testimony that
8 Sister -- can I ask you a question? Is it Sister Helen or
9 Sister Prejean?

10 MS. CONRAD: Sister Helen.

11 THE COURT: Presumably nuns use their first name.

12 MR. WEINREB: So if the testimony that Sister Helen
13 gives is limited in the way the Court directed, there will be
14 no need for Dr. Francis.

15 MS. CONRAD: Well, then I don't need to address his
16 opinion about the boat writings.

17 MR. BRUCK: If I could get back to the SAMs
18 limitation, I trust that the testimony will not involve
19 pretrial litigation in this case which is --

20 THE COURT: That raises the notice question. I'm
21 inclined against it because I think there is a difference
22 between -- the purposes of the pretrial -- the purposes of the
23 accommodations in pretrial which had to do with the Fifth and
24 Sixth Amendment implication, I think I said it at the time that
25 I was not sitting on this as a judge drawing the Civil Rights

1 case but only as it impacted the fair trial right of this
2 defendant in this case and I didn't want to make any judgments
3 beyond that. So I think there can be a substantial difference
4 in the judicial prospective on pretrial addressing SAMs in the
5 context of a criminal prosecution as opposed to judicial
6 attention to the conditions of confinement postconviction.

7 MR. WEINREB: Well, and yet --

8 THE COURT: And we can't get into that with the jury,
9 that distinction.

10 MR. WEINREB: But there's no guarantee, and, in fact,
11 we all know that, in fact, there will be litigation wherever
12 he's sent, and if he's sent to -- that there will be additional
13 litigation, he will continue to have a right to counsel and --

14 THE COURT: And we've said you can -- I think at the
15 level of generality, that can be put in. But to compare it to
16 what happened in this case I think is too gross a comparison, I
17 guess is what I would say, and the considerations certainly
18 that I was thinking of as we were considering these things is
19 how much does this interfere with the right to access to
20 counsel and those kinds of things for the criminal prosecution
21 where he is presumed innocent. All that changes with
22 conviction and the other circumstances. So I think it could be
23 an apples and oranges situation.

24 MR. MELLIN: The concern, your Honor, is that the
25 modifications in place now are going to roll over to ADX.

1 THE COURT: They will for a while anyway.

2 MR. MELLIN: So those changes in the immediate family
3 members.

4 MR. FICK: Even the modifications in place were all
5 about the members of the defense team and the defendant's
6 sister-in-law. All of the postconviction incidents that I was
7 able to find that nibbled at the edges of SAM were ultimately
8 about the exercise-of-counsel duties. And the government is
9 suggesting in their cross of Mr. Bezy, he's going to get
10 unlimited fan mail and he's going to write a book. And that is
11 way, way outside of the realm of possibility and unlikely.

12 THE COURT: You won the point.

13 (Laughter.)

14 MR. BRUCK: This other thing about TV, there is a
15 prisoner's composition we provided detailing the
16 psychologically debilitating effects for him of confinement in
17 H unit. We would like to enter that portion of that testimony
18 if the defendant -- if the government is going to be able to
19 show that he gets cable TV. This is a man describing going out
20 of his mind in that cell, becoming paranoid and having all
21 sorts of degrading conditions psychologically, with cable
22 television. And so it is just terribly unfair -- I realize the
23 Court hasn't ruled on this, but that's part of a mix that I
24 hope the Court will keep in mind.

25 THE COURT: Okay.

1 MR. WEINREB: We would object for the reasons --

2 MS. CONRAD: With respect to Sister Helen, I would
3 like a little leeway on leading on some of these points.

4 THE COURT: Yes. To stay within bounds? Yes.

5 MS. CONRAD: Thank you.

6 MR. WEINREB: No objection.

7 THE COURT: And you'll take a couple of minutes with
8 her to explain the limitations?

9 MS. CONRAD: Of course.

10 (The proceedings adjourned at 9:33 a.m.)
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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSE, RMR, CRR
Official Court Reporter

Date: 5/20/15